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In The

Supreme Court of the United States

October Term, 1992

PHILIP M. KRUEGER, M.D.,

Petitioner,

versus

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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PHILIP M. KRUEGER, M.D.,

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BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE,

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BRIEF IN OPPOSITION

The Respondent, BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, respectfully prays that the Petition for Writ of Certiorari filed by Petitioner to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

STATEMENT OF THE CASE

The Idaho Medical Practice Act, Title 54, Chapter 18, Idaho Code, authorizes the Idaho State Board of Medicine, hereinafter referred to as the Board, to regulate physicians practicing within the State of Idaho. Idaho Code § 54-1814 allows the Board to take disciplinary action against a physician for several reasons, including:

> (7) The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

As will be discussed, this statutory provision allows disciplinary action based upon "medical malpractice".

Dr. Krueger is a Board certified obstetrician-gynecologist who has practiced in Idaho since 1976. The Board filed a Complaint against Petitioner on November 8, 1988, alleging violations of Idaho Code § 54-1814(7) with respect to nine patients in two years. The allegations against Petitioner are quoted in his Petition at pages 6 and 7.

Following pretrial proceedings and extensive discovery, including numerous depositions, a four-day adjudicatory hearing was held before a hearing officer. Twenty-five witnesses, including eighteen physicians, testified and sixty-six exhibits were admitted.

The Board concluded that Petitioner had engaged in malpractice with respect to seven patients.

At pages 8 through 12 of his Petition, Petitioner attempts to challenge the Board's findings of fact. These challenges should be disregarded for the reason that there was conflicting evidence and conflicts in evidence must be left to the *trier of facts. Further, Petitioner never challenged the Board's* factual findings in his state appeal. The issues in the state court appeals were restricted to constitutional and procedural challenges. (The Board's findings with respect to Patient H were overturned by the Idaho Supreme Court on appeal on procedural grounds.)

At page 14, Petitioner argues that the Board imposed "stringent conditions" in its Order. In fact, the conditions were merely that Petitioner could not perform surgery while impaired physically or mentally, could perform obstetrics only in an accredited hospital, and must obtain consultation on all high risk pregnancies. (Appendix, p. 24a.)

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED BY PETITIONER DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Pursuant to Rule 10.1 of the Rules of the United States Supreme Court, a petition for a writ of certiorari should be granted only when there are special and important reasons. None of the cases cited by Petitioner would support review of the decision of the Idaho Supreme Court upon the grounds set forth in Rule 10.1.(a) and (b) of the Rules of the United States Supreme Court. As will be discussed, the Idaho Supreme Court decision in this

case is consistent with decisions of the United States Supreme Court and other state courts.

In sum, the issues raised by Petitioner are not of such significance or import as to require review by the United States Supreme Court. Consequently, Respondent respectfully requests that the Petition be denied. In the alternative, Respondent requests this Honorable Court to issue a summary affirmance or a dismissal for want of a substantial federal question. Rule 16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332 (1975).

II

IDAHO CODE § 54-1814(7) IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent acknowledges that the pursuit of a lawful profession is a valuable property right subject to the protections of the due process clause of the Fourteenth Amendment to the United States Constitution. *Dent v. West Virginia*, 129 U.S. 114 (1889); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (1957). The case of *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), cited by Petitioner did not even consider the due process clauses of either the Fifth and Fourteenth Amendments as Petitioner contends at page 16. Further, none of the other cases cited by Petitioner in his Petition ever considered the due process clause of the *Fifth* Amendment. The case of *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), cited by Petitioner was overruled by the case of *North*

Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

The sole issues raised on this Petition for Writ of Certiorari are challenges that the applicable statutory language is void for vagueness and the jury verdict should have been considered. Petitioner does not allege any other due process violations with respect to the procedures utilized by the Board in providing Petitioner with adequate notice of the claims against him and an opportunity to be heard on those claims.

A statute may violate the due process clause of the Fourteenth Amendment if its terms are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Petitioner argues that Idaho Code § 54-1814(7) is unconstitutionally vague on its face because there are no administrative rules specifically listing what acts fall within this statutory prohibition. Petitioner's argument fails to note that Idaho Code § 54-1814(7) merely codifies the well established definition of "medical malpractice" in Idaho statutes and case law.

The Idaho Supreme Court stated:

> We agree with the district court's finding that this statute is not unconstitutionally vague on its face, even though the Board has not promulgated any regulations to further define or explain the statute. The language of the statute

> is similar to the well-accepted definition of medical malpractice contained in I.C. § 6-1012, and is merely a codification of already existing case law. *Bolen v. United States*, 727 F.Supp. 1346 (D.Idaho 1989); *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980); *Swanson v. Wasson*, 45 Idaho 309, 262 P. 147 (1927).

(Appendix, p. 50a.) Idaho Code § 6-1012 provides that, in a malpractice action for damages, one must prove that the physician or health care provider " . . . negligently failed to meet the applicable standard of health care practice of the community. . . . "

In the case of *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980), the Idaho Supreme Court upheld the constitutionality of the comparable statutory language. 101 Idaho at 425. See also, *Leazer v. Kiefer*, 120 Idaho 902, 821 P.2d 957 (1991). Idaho Code § 54-1814(7) merely incorporates these same long-standing definitions of medical malpractice and does convey sufficient warnings of proscribed conduct to withstand any vagueness challenge.

It is well settled that a state has broad power to establish and enforce standards of professional conduct for physicians and that the state's power extends beyond initial licensing and includes continuing supervision. *Barsky v. Board of Regents*, 347 U.S. 442 (1954). The state has a legitimate interest in regulating the quality of medical care provided within its borders. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Graves v. State of Minnesota*, 272 U.S. 425 (1926); *Dent v. West Virginia*, 129 U.S. 114 (1889).

Petitioner cites the case of *Czarra v. Board of Medical Supervisors*, 25 App. D.C. 443 (1905) for the proposition that a statute authorizing revocation of a physician's

license for "unprofessional or dishonorable conduct" is void for vagueness. In that case, the District of Columbia court did conclude that the statute was void on its face, but ruled:

> "Unprofessional or dishonorable conduct," for which the statute authorizes the revocation of a license that has been regularly obtained, is not defined by the common law, and the words have no common or generally accepted signification . . .

25 App. D.C. at 451. Idaho Code § 54-1814(7) does not suffer from the same criticism.

Further, the ruling in *Czarra* has been eroded by the more recent case of *Ladrey v. Commission on Licensure to Practice the Healing Art in the District of Columbia*, 261 F.2d 68 (1958), *cert. den.* 358 U.S. 920 (1958), which involved an action to revoke a physician's license on the grounds of "misconduct". The physician had used drugs or instruments with the intent to cause a miscarriage. The physician argued that the statutory term "misconduct" was unconstitutionally vague. The Court of Appeals for the District of Columbia determined that the statute was not unconstitutionally vague because revocation proceedings were conducted by the court with full opportunity for proof of misconduct as a matter of fact. The court noted: "Nor can we doubt that every medical practitioner knows fully that the performance of a criminal abortion is misconduct." 261 F.2d at 71.

Various decisions of the United States Supreme Court support a finding that Idaho Code § 54-1814(7) is not unconstitutionally vague. In the case of *Lehman v. State Board of Public Accountancy*, 263 U.S. 394 (1923), an

accountant sought to enjoin disciplinary action against him. The United States Supreme Court ruled that a statute authorizing the cancellation of an accountant's certificate "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause" was not unconstitutional and did not deprive the accountant of property without due process of law. The Court noted that the board had never adopted any code or promulgated any rules defining what is or is not unprofessional conduct. The United States Supreme Court stated:

> Plaintiff in error puts some stress upon the absence of rules by the board, urging that the statute is in conflict with the Constitution of the United States, because it purports to authorize the revocation of a certificate "without defining or determining in advance what grounds or facts or acts shall be sufficient cause for such revocation." Such absence permits, it is asserted, arbitrary action. We cannot yield to that assertion or assume that the board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way with opportunity of rebuttal.

263 U.S. at 398.

The *Lehman* case was quoted in the case of *Yoshizawa v. Hewitt*, 52 F.2d 411 (9th Cir. 1931). The Ninth Circuit considered a physician's challenge to the constitutionality of a Hawaii statute authorizing revocation of a physician's license on grounds of "gross carelessness and manifest incapacity." The Ninth Circuit noted that "gross carelessness" is synonymous with "gross negligence," which has a well established meaning based upon prior

case law. As a result, the terms "gross carelessness" were not unconstitutionally vague.

Similar results have been approved by the United States Supreme Court in the following cases: *Meffert v. The State Board of Medical Registration and Examination*, 66 Kan. 710, 72 P. 247 (1903), *judgment affirmed*, 195 U.S. 625 (1904) (revocation of a physician's license upheld on grounds of "gross immorality"); *Brinkley v. Hassig*, 130 Kan. 874, 289 P. 64 (1930), appeal dismissed for want of a substantial federal question, 282 U.S. 800 (1930) (revocation action based on "gross immorality" and "unprofessional conduct").

In the case of *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400 (Tex. Cir. App. 1972), the Texas Court of Civil Appeals considered a Texas statute which allowed disciplinary action against a physician for "grossly unprofessional or dishonorable conduct, or [sic] a character which in the opinion of the Board is likely to deceive or defraud the public." 476 S.W.2d at 403, note 1. The Texas court ruled that the statute was not unconstitutionally vague. On appeal to the United States Supreme Court, the case was dismissed for want of a substantial federal question. *Martinez v. Texas State Board of Medical Examiners*, 409 U.S. 1020 (1972).

In addition, various state cases establish that Petitioner's actions violated accepted standards of health care. *Kauffman v. Department of Commerce, Board of Medical Examiners*, 746 P.2d 103 (Mont. 1987) (revocation of a physician's license for gross malpractice); *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973) (a civil action was brought for

damages caused by a misapplication of forceps); *Chastek v. Anderson*, 416 N.E.2d 247 (Ill. 1981) (disciplinary action against a dentist based upon three counts of improper and unprofessional treatment); *Board of Dental Examiners v. Brown*, 448 A.2d 881 (Me. 1982) (revocation of a dentist's license based upon alleged incompetence and unskillfulness); *Moreland v. Ambach*, 489 N.Y.S.2d 403, 111 A.D.2d 533 (1985) (revocation of a physician's license based on five counts of gross negligence and incompetence); *Rosi v. State Medical Board*, 665 P.2d 28 (Alaska 1983), *cert. denied by Storrs v. State Board Medical Board*, 464 U.S. 937 (1983) (discipline of a physician on the statutory ground of "professional incompetence").

In sum, Idaho Code § 54-1814(7) is not unconstitutionally vague under controlling precedent of this Court and the Supreme Courts of various states. It clearly advises physicians that if they engage in malpractice they may be subject to discipline. However, Petitioner argues that the Board must go one step further and prepare voluminous administrative rules telling a physician what decision to make in every instance of treatment in order to avoid committing malpractice. Such a requirement is not only inconceivable, it is impossible, particularly when one considers there are numerous medical specialties, thousands of medications and millions of patients with different symptoms.

Contrary to Petitioner's argument at page 32 of his Petition, the issue of whether Petitioner violated the community standard of care was not sharply disputed. Petitioner presented no local or Idaho ob-gyns to testify in his support. Further, the only ob-gyn he called did not support him on one-hand surgery. While there were some conflicts in the evidence, it is the role of the trier of fact to

review the evidence and make decisions based on the evidence.

In sum, Idaho Code § 54-1814(7) is not unconstitutionally vague on its face.

III

IDAHO CODE § 54-1814(7) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONER IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

With respect to this issue, the Idaho Supreme Court noted that an administrative board may not merely rely on their own expertise, experience and collective knowledge in making decisions. However, the Idaho Supreme Court noted that, in this case, the Board had extensive expert witness testimony regarding the professional standards in question from which the Board made its determination that Petitioner's conduct did not meet the local standard of care. (Appendix, p. 52a.) The Idaho Supreme Court concluded:

> In view of the similarity between the disciplinary statute and the accepted definition of medical malpractice, we believe the language of I.C. § 54-1814(7) was sufficient to notify medical practitioners that they could be disciplined for failure to conform to the community standards. (Appendix, p. 54a.)

In support of his argument, Petitioner cites various federal cases which prohibit use of individualized administrative disciplinary actions. However, each of those cases are distinguishable and are not dispositive. In the

case of *Jensen v. Administrator of Federal Aviation Administration*, 641 F.2d 797 (9th Cir. 1981), the Ninth Circuit ruled that an administrative FAA regulation was invalid because it was in direct conflict with a federal statute. The quotation cited by Petitioner is merely dicta and deals with a situation entirely different than that involved in this case. The cited decision was later vacated. See, *Jensen v. Administrator of Federal Aviation Administration*, 680 F.2d 593 (9th Cir. 1982).

The case of *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976), dealt only with eligibility for public assistance, not professional licensing issues. In that case, the Seventh Circuit Court of Appeals noted that eligibility was determined based solely on the unwritten personal standards of each individual staff member. That is, there was a total lack of any written standards. Again, this case is not at all comparable to the current case.

Two of the other three cases cited by Petitioner at page 21 are subject to the same criticisms. That is, the *Carey* and *Holmes* cases dealt solely with eligibility for public assistance in situations where there were absolutely no standards.

The case of *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), does not hold that "due process requires adoption of reasonable rules and regulations establishing standards for granting or denying liquor licenses" as Petitioner contends. Rather, the case involved a civil rights action and a request for declaratory judgment based upon the claim that Mrs. Hornsby was denied a liquor license

"without a reason therefor." The court held that the applicant had a right to know the applicable regulatory standards.

Contrary to Petitioner's contention, the Board did not engage in "ad hoc" rule-making or subjective interpretation of Idaho Code § 54-1814(7) at Petitioner's expense. The Board's decision was based upon the fact that Idaho Code § 54-1814(7) sets forth a well-established definition of "medical malpractice" and upon substantial, although conflicting, expert testimony regarding the community standard of care.

As can be seen from Respondent's Statement of Facts, Petitioner incorrectly argues at page 22 of his Petition that one-hand surgeries had previously been approved and accepted as standard practice in Boise. That claim is not supported by the evidence.

In sum, Idaho Code § 54-18141 is not unconstitutionally vague as applied to Petitioner.

IV

THE BOARD'S REFUSAL TO CONSIDER THE MEDICAL MALPRACTICE JURY VERDICT REGARDING PATIENT F DID NOT VIOLATE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner next argues, beginning at page 24 of his Petition, that the Board violated his procedural due process rights by failing to receive into evidence and consider the jury verdict rendered in a civil case involving Patient F. Petitioner's Motion to the Board was filed two months after the jury verdict and one day before the scheduled Board meeting.

On this issue, the Idaho Supreme Court stated:

> Krueger maintains the jury concluded that he had met the local community standard of care as to patient F and that the verdict was a judicially cognizable fact which the Board should have considered. While the verdict was favorable to Dr. Krueger, it is unclear whether the jury felt he had not violated the standard of care. The question which the jury answered negatively asked: "Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff's [name omitted] injuries?" The negative answer could have indicated that the plaintiff had failed to prove that she suffered injuries or that the jury believed the negligence of Krueger was not the proximate cause of the injuries. The verdict was not relevant under I.R.E. 401 as it did not have a tendency to make the existence of any fact that was of consequence to that proceeding more probable or less probable. We also agree that the jury verdict is not entitled to any preclusive effect, for the reason that the Board was neither involved in the independent malpractice action nor had a special relationship which would make it appropriate to bind them by the verdict. We therefore affirm the district court's finding that the Board was correct in refusing to consider the verdict.

(Appendix, pp. 56a and 57a.)

Even if the jury had addressed the issue directly, its decision was not admissible in the Board action. The Board action is an administrative proceeding, whereas the other was a civil trial. The Board was not a party to that civil action and consequently, had no control over or

knowledge regarding the evidence which was actually presented at that civil trial. The evidence that was offered in the Board's action may be entirely different from that which was offered in the civil action. Further, it is the Board's statutory duty, using its medical expertise, to make decisions on the evidence and record before it, not to make a decision based upon unknown evidence presented to a jury of lay persons in an unrelated action. To allow an unrelated jury verdict to control the Board's statutory duty would be an improper delegation of the Board's statutory functions.

Under the principle of res judicata or claim preclusion, a judgment on the merits in a prior proceeding can act as a bar in a subsequent proceeding *only* if the same parties are involved and the same cause of action is involved. *Andre v. Morrow*, 106 Idaho 455, 680 P.2d 1355 (1984). In this case, the Board staff was not a party to the jury action and the causes of action are totally unrelated.

Petitioner argues that the jury verdict must not only be admitted, but must be accepted without question based upon Idaho Code § 67-5210(4) which provides: "notice may be taken of judicially cognizable facts." Idaho Code § 67-5210(4) merely states a rule comparable to the Rules of Evidence on judicial notice. Rule 201, I.R.E., defines judicial notice as follows:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

See also, Federal Rules of Evidence, Rule 201. Whether a jury verdict was right or wrong is certainly subject to reasonable dispute. It is also a fact not generally known and whose accuracy can reasonably be questioned. Judicial notice of a jury verdict in an unrelated civil case is not appropriate.

The Idaho Supreme Court was correct in affirming the Board's decision to deny Respondent's request to consider the jury verdict.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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